six months after date, to the order of the plaintiffs, without defalcation, and *without any relief whatever from appraisement or valuation laws*. There was judgment against the defendant, under which he is entitled to the *benefit of appraisement*, by the law of this State, and the plaintiffs have appealed and assigned as error the refusal of the judge to render a judgment *without* the benefit of appraisement as prayed for in their petition.

The plaintiffs are merchants, residing and carrying on business in the city of Philadelphia, at which place the note was dated, and was executed by the defendant without specifying any place of payment. It is true, as contended, that the right to the benefit of appraisement given by law to a debtor in case of the forced alienation of his property for the satisfaction of his debts, may be waived by him, and his property sold at the first offering for cash, for whatever it may bring. But the waiver in such a case must be in a more solemn and authentic form than that of a mere promissory note, otherwise the waiver would become a mere *formula* in such instruments, and the entire policy of the law thereby defeated to the injury of both debtors and creditors.

In the Supreme Court of Michigan, October Term, 1860.

EBER B. WARD *vs.* WILLIAM WARNER AND ANOTHER.[1]

1. The general nature of the action of assumpsit, considered.
2. A canal through a marsh in which a stream is lost, cut by private individuals through the land of one of them, for the purpose of affording floatage for timber and lumber through the same in connection with the stream—there being no evidence that the waters of the stream ever ran along its line, or that it was the improvement of an existing water channel—is a *private* way, and the public are not entitled to use it, unless it be dedicated to their use.
3. The owner of the land on which such canal was dug, and who appeared to have incurred the major part of the expense of making it, gave notice to other individuals, who had contributed to its repair, that they must compensate him for its use at a rate which he specified in his notice; and on their refusal, and continuing its use under a claim of right to do so, brought action in assumpsit to recover compensation for the use. *Held*, that the action could not be maintained.

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[1] We are indebted to the learned Reporter of Michigan for this case. It will be found in 8 Mich. 508, which is still in press, but will be very shortly published.—*Eds. Am. Law Reg.*

4. The law will not imply a promise to make compensation for the use of the canal before the notice was given, and while it was permitted by the plaintiff without objection, and without demand of compensation.
5. Nor will the law imply such a promise after the notice, since any implication of a promise is precluded by the denial by defendants of all right to compensation, and the assertion of an adverse right in themselves. The adverse entry, if the claim of right is unfounded, is a naked trespass, upon which no duty to compensate arises which can be converted into a contract.

Error to Wayne Circuit.

Ward brought assumpsit in the court below, against William Warner and Albert L. Catlin, and declared for the use by defendants of a certain canal across lands of the plaintiff, in St. Clair county, in floating the logs and lumber of the defendants in and through the same. On the trial, the following stipulation was read in evidence:

"In the Circuit Court for the county of Wayne: *Eber Ward* vs. *Albert L. Catlin and William Warner.*

It is hereby stipulated that on the trial of this cause it shall be admitted, as follows:

That in 1853, the plaintiff, William Parker, and some other gentlemen, interested as owners of pine lands on Mill Creek, conferred together about opening or digging a canal at the spot where the canal now claimed by the plaintiff was afterwards built. That, with a view of carrying out this idea, plaintiff bought certain lands through which the canal now runs, the legal title to which is still in the plaintiff. That in the summer of 1854, the plan was settled as follows: It was estimated that the entire cost and outlay, of carrying out the entire enterprise, would be $5,000, which sum was divided into five equal shares, of which the plaintiff was to pay one, Willard Parker one, the Messrs. Moore one, Messrs. Smith & Dwight one, and the remaining fifth it was supposed might be paid by other parties. And the parties whose names are above mentioned all agreed to the same. That after this was so agreed on, the plaintiff proceeded and made a contract for building the canal, and cleaning out a part of Mill Creek, and plaintiff paid therefor $5,000, the contract price.

That the said Parker and the Messrs. Moore paid to the plaintiff $1,000 each, as their share of the said outlays, and said Smith &

Dwight have always acknowledged their liability so to do, but, having failed in business, have been unable so to do.

That the object of making the said canal was to concentrate and confine in a channel, so as to afford floatage for logs and rafts, the waters of Mill Creek, which then, in that locality, were spread and diffused over a large marsh. That said canal was dug and the waters of said creek drawn through it in 1854, and have so continued to run ever since; and it now constitutes the bed and channel in which said water of said creek runs.

That the waters of Mill Creek were, before the building of said canal, navigable both above and below said marsh, and said canal operated to carry said waters in a navigable channel through said marsh. That said canal is about two miles long, about sixteen feet wide, and four feet deep.

That large amounts have been expended by different individuals, in cleaning out the channel of said creek, both above and below the said canal.

That, in 1855, it was found necessary that the upper end of the canal should be enlarged, to make the navigation more practicable, and that Mill Creek, below the canal, should be improved; and that for these purposes the expenditure of $1,000 was necessary. This work was done, and the amount contributed by the said Parker, the plaintiff, the Messrs. Wrights, and the defendants, each paying $250. Of this $1,000, about $250 was expended in the upper end of the canal itself; the balance in the creek below.

That the first intimation the defendants had that claims were made against any person for the use of said canal, was derived from the printed notice, [copied below, marked B,] which was posted in June, 1857. That no claim was made on defendants personally till August, 1857, when an account was sent them, and payment demanded. A letter of Towle, Hunt & Newberry, attorneys for plaintiff, was handed them about September 4th, 1857, requiring them to call and pay for the use of the canal, to which they responded by denying all liability, and insisting upon a right to its use. That defendants never assented to any liability to pay for the use of the said canal, but always claimed a right to the free naviga-

tion of the same." [The stipulation then gives the quantity of logs run by defendants through the canal, in 1856, 1857, and 1858, specifying the amount before and after the demand of payment, and gives a statement, from which it appears that plaintiff expended in buying said land, and in and about work on said canal, $7,302 03, and received upon the same from Parker, Carlton, Smith, and Moore & Foot, $3,091 48.]

The following is the notice, marked B.

"Notice.—All persons who have run logs through the canal made by E. B. Ward and others, in St. Clair and Lapeer counties, connecting Mill Creek, are hereby notified that they will be charged 25 cents per 1000 feet for all logs that have heretofore been run or that may hereafter be run through said canal, until the tolls are paid in advance, or arranged for with the subscriber.

"Parties owning lands above the canal may commute by paying a fair *pro rata* proportion of the cost of said canal, for the privilege of running logs from specified lots without paying tolls.

"All parties having used the canal during the past year, are hereby requested to call at their earliest convenience, and settle the tolls now due.

"E. B. WARD.

"DETROIT, June 1, 1857."

In addition to these documents, plaintiff introduced evidence, tending to show that the marsh through which the canal was dug was not, before that time, navigable for logs, or rafts, or boards; that it was extensive, covering about one-third part of a township; and that the stream above had never been used for floating logs before the canal was constructed. He also gave evidence of the great value of the canal to the owners of timbered lands near it, and as to what would be a fair compensation for the use of the canal. The defendants proved by a witness that, before the canal was made, the creek was lost in the marsh for a distance of some two miles; that there were in the marsh one or two open spaces filled with water, and he thought that perhaps the channel of the creek had been, at some former time, at those spots.

The court instructed the jury:

1. In order that the plaintiff shall recover, he must show that

there has been a promise, either expressed or implied, on the part of the defendants, to pay for the use of the canal. It is not claimed that there is an express promise. The question, then, is, was there an implied promise?

2. If it were shown that Mill Creek ended in the marsh, and that a new distinct stream came out below, then it might be that the plaintiff, on digging a canal through the marsh over land owned by him, might forbid parties using the canal, unless they would agree to pay for such use. But if the jury believe, from the evidence, that there had been at some former period a continuous channel through what is now a marsh, which has been by some natural means nearly filled up, and the waters diffused over the marsh, and that the canal which was dug by the plaintiff had the effect simply to concentrate the waters of Mill Creek, into one body, then the plaintiff can not require pay for the use of such canal, or debar others from using it on their refusing to pay.

3. Even if the plaintiff could require pay for such use, yet if the jury believe from the evidence that the defendants used the canal for floating logs, and that on being required to pay for such use, they refused, and denied the right of the plaintiff to charge therefor, and claimed the right to use the canal free of charge, then no promise to pay can be implied. The defendants were at the most but trespassers, and no action of assumpsit will lie against them.

The jury returned a verdict for defendants, and the plaintiff having excepted to the instructions, now brought error.

Towle, Hunt and Newberry, for plaintiff in error.

D. C. Holbrook and G. V. N. Lothrop, for defendants in error.

The opinion of the Court was delivered by

MARTIN, C. J.—The first question presented, and which disposes of this case, is whether, upon the facts, assumpsit will lie, or whether the plaintiff's remedy, if he have any, be not trespass.

Whenever a benefit accrues to a party, whether for services rendered, money expended, or property used, or from any other cause upon which a duty to make compensation to another arises, the law

will, in the absence of an express promise to make such compensation, imply one from the transaction and the duty. Thus, if A performs labor or renders services for B, at the latter's request, or with his knowledge and assent but without a contract for compensation, the law will imply a promise by B to A therefor for what such labor or services shall be reasonably worth. So when the goods of A have been wrongfully taken or held by B, and sold, although the act of B in taking them, or in their conversion, may have been tortious, yet as he has sold them and received a benefit from such conversion, A may waive the tort, and bring assumpsit for the price for which they were sold. So when a party enters upon land under a contract to purchase it, which is not performed, and such party is after such failure of performance notified that if he remains in possession he will be required to pay rent, if he remain the law will imply a promise to pay rent from the time of such notice. But, in the latter case there can be no promise implied to pay rent for the occupation while the contract was in force, because no payment of rent could during that time have been in the contemplation of either party, and no such duty existed. And where one has the clear right to the use and control of property, and permits its use by others upon condition of payment therefor, when the condition is specific in terms, the law will imply from the use by one having knowledge of the terms, an assent to them, and a corresponding promise to pay; and when not known, a promise of reasonable compensation. In the first case the implication is founded upon the knowledge of the terms and conditions of the use, and in the latter upon the duty arising from the use; but in neither will it be made when the party using it asserts adverse rights, and acquires and uses the property under an adverse claim of right. These are principles which, notwithstanding the diversity of opinion upon kindred questions, are clearly settled and recognized. But we are not aware of any principle upon which it can be held that a mere naked trespass can be made the basis of an implied assumpsit. If the trespass be proved, no presumption of an agreement for compensation can be raised; for the act of an entry upon lands is in contravention of, and not in subordination to, the rights and claims of the party injured. For

such injury the law has given a different remedy, and one founded upon the injury; and no promise can be implied to pay, but a liability arises to compensate for the wrong and injury.

It was said in *Hosmer* vs. *Wilson*, 7 Mich. 294, that the liability in cases of implied promises, is founded upon a duty, which the law imposes upon the party receiving the benefit, to pay; and that this duty the law enforces under the fiction of an implied contract; and Martin, B., in *Clay* vs. *Yates*, 36 E. L. & E. 546, in speaking of the liability, says: "I should say the duty of the man to pay arises out of the transaction itself; and think this is a more correct expression than talking of an implied contract, when a contract was never made."

If, therefore, the plaintiff has a right to require compensation for the use of his canal prior to the notice of June 1st, from the simple fact that the defendants have used it, then a duty arises upon their part to pay such compensation, and the law will imply a promise to pay; but if he has no such right, no duty to pay arises from the assertion of such right, or from the fact of the use. Now the canal, upon the case presented, was clearly a private way. It is true that it was dug by contribution, and was for a time thrown open to all passers, and perhaps still is, to those who contributed towards its construction, or those who have since contributed towards keeping it in repair. But it was nevertheless upon the land of the plaintiff. No evidence exists, tending to show that the waters of Mill Creek ever ran along its line, or that it was the improvement of an existing water channel. Indeed, the contrary is evidently the case; and the fact that it was dug through a marsh (the land belonging to the plaintiff) in which the creek was lost, does not render it a part of the stream, so as to confer upon the public any rights of way along it.

It exists, then, as a way or passage opened by the plaintiff, and which he might dedicate to the public or reserve for his private use, at his option. Whether those who joined with him in its construction have or have not the right of passage along it, or what their rights may be, are questions not before us; but so far, at least, as all others are concerned, no such right exists, for no dedication to

the public is shown, nothing more than a sufferance of its use, which he might revoke at any time. For its use, while this permission existed, he had no right to demand compensation, nor will the law raise a duty to pay it.

But he had a right to require payment or compensation, before he would at any time suffer its use by individuals upon whom the right had not been specially conferred; and in such case those using it would be liable to pay therefor, according to the terms imposed, if assented to, or if used under circumstances from which the law would imply assent. In *Wadsworth's Administrator* vs. *Smith*, 11 Me. 278, which was assumpsit on an account for shipping logs along a stream, which had been made floatable for logs and lumber by the application of artificial means, at the expense of the owner, while the right to exact toll was questioned, it was held that a proprietor may open a passage through his land for his own accommodation, and he may permit others to pass it under an agreement for compensation, which may be enforced at law. "He may yield the enjoyment to one and refuse it to another. If he receives compensation for such enjoyment, the law will permit him to retain it; if he accept a promise as an equivalent, the law will enforce it, and a promise may as well be implied in such a case as in any other."

The plaintiff, therefore, having, until the giving of the notice of June 1st, suffered the public to pass along his canal without objection, or making any demand for compensation, must be confined to his claim upon such use of the canal as occurred after such notice.

For the purpose of revocation of the general license, and a declaration that compensation would thereafter be demanded, the notice having come to the knowledge of the defendants, was sufficient and competent to impose upon them a liability to pay for its use, according to the terms of the notice, if subsequently used, had the right to demand any compensation been acknowledged, or recognized and not denied; for in such case the law will presume that they used it upon the terms imposed, and raise the corresponding duty, and imply the contract accordingly. But in the present case, all such implication is precluded by the fact that the defendants denied any

right to demand compensation for the use, and used it in defiance of the plaintiff's claim, and under claim of right in themselves; and they cannot therefore be presumed to have acceded to the terms imposed.

If, then, any duty can be implied, it is to pay what such use is reasonably worth. Now, as already remarked, the plaintiff had a right to require payment, as a condition to the use of the canal; and had he required such, but fixed no price, and the defendants had used it with knowledge of such terms, and under the condition, beyond doubt the duty would be raised to pay what such use would be reasonably worth; but if the effect of a denial of the right to demand compensation, and a use of the canal in contravention of the claims asserted by the plaintiff, will prevent the implication of a duty to pay a specific rate imposed, how can it be said that it will still raise the duty of paying according to its worth? If the denial goes to anything, it must go to the whole claim of the plaintiff for compensation, and will preclude every presumption of the recognition of a duty upon which a contract can be implied; while, on the other hand, if the law will imply a duty, it will imply one co-extensive with the terms imposed. It goes to the whole remedy, whether for a specific price, or for reasonable compensation. But the law implies the duty only where the right of dominion over the subject matter is conceded, or not questioned; and never where the use is under an adverse claim of right, or a denial of that asserted. In such case, the entry, being adverse to the plaintiff, is a naked trespass, upon which no duty to compensate, which can be converted into a contract, arises; for such duty can only be implied where the conventional or implied relation of promisor and promisee exists, or where the duty springs from such change of relation after the wrongful act, as in the case of the conversion into money of property wrongfully taken, and the like. If he could be held to be a promisor in such case, under any implication of law, no valid reason can be given why an intruder, under a claim of right, may not be so held in all cases. The conclusion can not be avoided that in such a case he can not be regarded in any other light than as a trespasser; for he not only enters upon the property in opposition to the

notice of the owner forbidding it, except upon the terms of recognizing and responding to his right to require compensation, but also under the assertion of a claim of right inconsistent with and adverse to that made by the owner.

The subject of tolls, and the right of the plaintiff to collect them, was very elaborately discussed in this case, but, under the views we have taken, it does not become necessary for us to consider it.

From the views already expressed, it follows that the defendants in this case are mere naked trespassers, and no assumpsit can be implied from their use of the canal; and this view renders it unnecessary to consider any other of the questions raised.

The judgment is affirmed.

CAMPBELL, J., concurred. CHRISTIANCY, J., also concurred in the result.

MANNING, J.—I think trespass, and not assumpsit, is the proper action. Was the stream navigable before the canal was dug? The defense is that it was, and that defendants, in common with other citizens of the State, had a right to use it to float their logs. The law will not imply a promise in such circumstances; for there is nothing to base a promise upon; as defendants received no benefit from the use of the canal, if their defense be true.

Assumpsit for money had and received is an equitable action, and may be brought when one person has money in his hands that in equity and good conscience belongs to another. But that is not this action, which is assumpsit to recover compensation for the use of plaintiff's canal; and, like assumpsit for goods sold and delivered, or for work and labor, will lie only on a promise, express or implied.

When plaintiff's goods have been wrongfully taken, it is said he may waive the trespass and bring assumpsit for goods sold and delivered. This may be so where defendant lays no claim to the goods, and the trespass is wholly wanton on his part. But when he claims them as his own, or claims a right to the possession of them, and justifies the taking on that ground, trespass and not as-

sumpsit is the proper remedy. In a case of pure trespass, by which I mean one committed without color of right to the property taken, the court may well say to defendant: You shall not be permitted to defeat the action by showing you took the goods without intending to pay for them, or with an intention to do a wrong with which the plaintiff, by putting a more charitable construction on your conduct, has not thought proper to charge you. This, I think, is all that is meant by waiving the trespass and suing for goods sold and delivered. There is no objection to such a course when the trespass is wholly separate from the right of property; but when it is mixed up with the right of property, and the question of trespass or no trespass depends on that right, and must stand or fall with it, the trespass cannot be waived, because none is admitted; and the law will not imply a promise to pay, as defendant took the goods in his own right.

The case at bar does not involve the right to personal property, but the right of the public to an easement over plaintiff's land. If the stream was navigable when the canal was dug, the public still has a right to use it; otherwise not, unless it has since been dedicated to the public.

It was urged on the argument, as a reason why the court should sustain the present action, that in trespass the plaintiff could recover nominal damages only. I do not think so. In trespass for breaking and entering his close, he may allege and prove the use of the canal by defendants as special damages.

Judgment affirmed.